



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Paul and Barbara Stitt and Gary and
Gloria Yealon for an After-the-Fact Permit to Fill
and Grade an Area in Excess of 10,000 Square
Feet on the Banks of Lake Michigan, Town of
Manitowoc, Manitowoc County

Case No. 3-NE-01-36-0678LB

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Paul and Barbara Stitt, 123 Cleveland Avenue, Manitowoc, Wisconsin, 54220 and Gary and Gloria Yealon, 7377 Lakeshore Drive, Manitowoc, Wisconsin, 54220, applied to the Department of Natural Resources for a permit to grade and excavate an area in excess of 10,000 square feet on the bank of Lake Michigan. Approximately six feet of the top of the bluff would be removed, down to the elevation of the bottom of an existing excavated pond. Twenty-eight feet of bluff height would remain undisturbed. According to the plans submitted, upon completion of the excavation work, the area would be revegetated with native grass, forbs, shrubs and trees, with a temporary cover crop of native prairie species. The toe of the bluff would be planted with native red osier dogwood and willow shrubs to minimize bluff erosion. The proposed project is located in Government Lot 2, Section 18, Township 18 North, Range 24 East, Town of Manitowoc, Manitowoc County.

The Department of Natural Resources issued a Notice of Proposed Grading which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. A timely objection was received from The Friends of the Branch River. On April 3, 2002, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice, a hearing was held in Manitowoc, Wisconsin on August 6, 2002, before Jeffrey D. Boldt, Administrative Law Judge.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Paul and Barbara Stitt
P. O. Box 730
Manitowoc, WI 54220

Gary and Gloria Yealon
7337 Lakeshore Drive
Manitowoc, WI 54220

Wisconsin Department of Natural Resources, by

Attorney Edwina Kavanaugh
P. O. Box 7921
Madison, WI 53707-7921

Friends of the Branch River Watershed, by

James Aasen
4014 Maplewood Road
Two Rivers, WI 54241

Vickie Mayer
10633 Wehausen Road
Manitowoc, WI 54220

Manitowoc Fish and Game Association, by

John Reimer
1209 South 14th Street
Manitowoc, WI 54220

Gerald Wiesner
1617 South 11th Street
Manitowoc, WI 54220

Lake Michigan Federation, by

Attorney Laurel O'Sullivan
220 South State Street, Suite 1900
Chicago, IL 60604

FINDINGS OF FACT

1. Paul & Barbara Stitt, 123 Cleveland Avenue, Manitowoc, Wisconsin, 54220 and Gary & Gloria Yealon, 7377 Lakeshore Drive, Manitowoc, Wisconsin, 54220, applied to the Department of Natural Resources for a permit to grade and excavate an area in excess of 10,000 square feet on the bank of Lake Michigan. The project site is Government Lot 2, Section 18, Township 18 North, Range 24 East, Town of Manitowoc, Manitowoc County. Lake Michigan abuts and is navigable in fact at the site. The application seeks a permit approving approximately 29,000 square feet of previous grading and approving a proposal to grade an additional area in excess of 10,000 square feet at the same site. (Exs. 1, 2) The Department and applicants have fulfilled all procedural requirements of Wis. Stat. §§ 30.19 and 30.02.

2. In 1999 the applicants had applied for a permit (Case No. 3-NE-99-104LL) for both after-the-fact and proposed additional grading of this site. The original application proposed to grade and slope all the way to the beach. After hearing, the DHA Administrative Law Judge denied the earlier application and ordered the applicant to submit to WDNR revised plans to regrade to the level of the bottom of a ponded area onsite, much less extensive grading than the original application. The decision required that the plans be acceptable to WDNR, contain certain conditions, and include a revised vegetation planting plan. (Ex. 3)

3. Applicants submitted revised plans as ordered in the decision for Case No. 3-NE-99-104LL. The revised grading plan at issue in this hearing calls for removing approximately 8 feet of the bluff top down to elevation 614 feet (the elevation of the bottom of the existing excavated pond) and resloping the area. Twenty-eight feet of bluff height will remain undisturbed. (Ex. 4) The revised vegetation plan calls for revegetating the disturbed area and bluff by planting a temporary cover crop of native prairie species, then planting native grass, forbs, shrubs and trees after completing excavation and grading. The plan also calls for planting the toe of the bluff with native red osier dogwood and willow shrubs to minimize bluff erosion. (Ex. 5) The parties all stipulated at hearing that the revised vegetation plan is satisfactory and that the vegetation plan is not disputed.

4. The Department issued a Notice of Proposed Grading stating that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. No one objected to the revised vegetation plan. Friends of the Branch River filed a timely substantive objection to the grading plan, so the Department forwarded a Request for Hearing to the Division of Hearings and Appeals. (Ex. 6)

5. The WDNR Water Management Specialist, Michael Hanaway, investigated the site and prepared a draft permit for this grading that incorporates the conditions required by the Division in the earlier decision. (Hanaway, Exs. 3,7,8) Hanaway testified that the revised vegetation erosion-control plan, in conjunction with the revised grading plan and conditions in the proposed permit, adequately protects the public interest in preventing erosion and maintaining natural vegetation and natural scenic beauty at this site. (Hanaway, Exs. 4,5,7,8)

6. The proposed project, if constructed in accordance with this permit will not adversely affect water quality, will not increase water pollution in surface waters and will not cause environmental pollution as defined in Wis. Stat. § 283.01(6m).

7. WDNR Engineer Dean Stitgen reviewed the revised grading plan. The revised grading plan, in conjunction with the revised vegetation plan and conditions in the proposed permit, adequately protects the public interest in preventing erosion and will stabilize the bluff to a degree reasonably necessary to protect public safety, welfare, rights and interest at this site. (Stitgen, Exs. 2,4,8)

8. The objectors presented the testimony of Dr. Richard Christensen, a Ph.D. Geotechnical Engineer with extensive experience. Dr. Christensen provided testimony that it would be possible to restore the bank of the bluff to something like its original state prior to the unlawful grading undertaken by Mr. Stitt. This could be accomplished by the use of rollers

rather than vibrating equipment for compaction and placement of a clay “plug” at the bottom of the existing pond. Stitgen opined that this plan was credible, but that there was still some risk of bank collapse. Both Dr. Christensen and Mr. Stitgen agreed that the Christensen plan would require close monitoring of the firm which actually undertook the grading to minimize the risks of bluff collapse.

9. Based upon the testimony of Stitgen and Hanaway; it is reasonable and necessary to amend the DNR’s proposed permit conditions to require that grading work be completed prior to November 30, 2002. This will stabilize the potentially dangerous bluff bank. Further, while it is hoped that all of the proposed plan can be accomplished within this year’s growing season (September 15, 2002), if it can not be accomplished by this date, the applicant should still undertake the grading and employ erosion control measures such as the use of a geo-fabric cloth to prevent runoff into the lake. Finally, given the bank instability the Division has added a condition requiring continuous monitoring and pumping as needed until the grading is complete.

10. The project, if completed in compliance with the grading and vegetation plan and the conditions in the draft permit, will not injure public rights or interest, including fish and game habitat; will not cause environmental pollution as defined in s. 299.01(4), will not result in any material injury to the rights of any riparian owners on Lake Michigan.

11. The proposed project will not impact wetlands if constructed in accordance with this permit.

12. The Department of Natural Resources and the applicant have completed all procedural requirements and the project as permitted will comply with all applicable requirements of Wis. Stat. §§ 1.11, 30.19(1)(c) and Wis. Admin. Code chapters NR 102, 103, 115, 116, 117, 150, 299.

DISCUSSION

The question in this hearing was whether or not the revised permit application meets the standards set forth in Wis. Stat. § 30.19(4). The original proposal (see: Ex. 3 NR) would have allowed the complete leveling of the bluff, and did not adequately plan for a vegetative cover of disturbed areas. Both of those defects are addressed in the revised plan. The plan put forth by the objectors would also likely meet the standards set forth in Wis. Stat. § 30.19(4). However, this does not change the fact that the revised plan also meets the standards. After the first hearing, the Division set forth general parameters which would preserve the public interest. The applicants have come forth with a plan that meets these requirements, and the permit must issue.

Mr. Yealon presented photographs which document nearly the entire three mile stretch of shoreline near the project site. The proposed project, by preserving 28 feet of the bluff bank, better fits into the natural variations in this area. It is unfortunate that any portion of the bank was lost by the unauthorized grading undertaken by Mr. Stitt. However, the revised proposal represents a relatively low-risk plan to stabilize the bank and preserve the natural features of the shoreline.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue all necessary orders relating to grading permit applications pursuant to Wis. Stat. §§ 30.19 and 227.43.

2. Unless a permit has been granted by the department ..., it is unlawful ... to grade or otherwise remove top soil from the bank of any navigable stream, lake or other body of navigable water where the area exposed by such grading or removal will exceed 10,000 square feet. Wis. Stat. § 30.19(1)(c)

3. The revised project will not injure public rights or interest, including fish and game habitat, will not cause environmental pollution as defined in § 299.01(4), and will not cause material injury to the rights of any riparian owners on Lake Michigan if undertaken pursuant to the permit conditions set forth below. Wis. Stat. § 30.19(4).

4. The conditions in the permit set forth below are reasonably necessary to protect public health, safety, welfare, rights and interest and to protect private rights and property. Wis. Stat. § 30.19(5)

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicants a permit to undertake the activities authorized by this permit, subject to the conditions in this permit. Failure to comply with any of these conditions renders this permit null and void.

1. You must notify the DNR Area Water Management Specialist, Michael Hanaway, (920-755-4942) before starting construction and again not more than 5 days after the project is complete.
2. You must complete the project as described on or before September 15, 2002. If you are unable to complete the project by this date, you must notify Mr. Hanaway and make arrangements to complete the grading by November 30, 2002, and submit a plan to control erosion in the absence of an established vegetative cover. The plan shall include but not be limited to the placement of geo-fabrics over disturbed areas until the spring 2003 growing season. Further, if the work is not completed by September 15, 2002, the permit holder shall continuously monitor and pump the existing ponded area on an as-needed basis. The permit holder shall make every reasonable effort to keep standing water out of the ponded area until the grading work is complete. If you will not complete the project by this date, you must submit a written request for an extension prior to the expiration date of the permit. Your request must identify the requested extension date and the reason for the extension. The Department may grant a permit extension, for good cause. You may not begin or continue construction after the original permit expiration date unless the Department grants a new permit or permit extension in writing.

3. This permit does not authorize any work other than what you specifically describe in your application and plans, and as modified by the conditions of this permit. If you wish to alter the project or permit conditions, you must first obtain written approval of the Department.
4. You are responsible for obtaining any permit or approval that may be required for your project by local zoning ordinances or by the U.S. Army Corps of Engineers before starting your project.
5. Upon reasonable notice, you shall allow access to your project site during reasonable hours to any Department employee who is investigating the project's construction, operation, maintenance or permit compliance.
6. The Department may modify or revoke this permit if the project is not completed according to the terms of the permit, or if the Department determines the activity is detrimental to the public interest.
7. You must post a copy of this permit at a conspicuous location on the project site, visible from the waterway, for at least five days prior to construction, and remaining at least five days after construction. You must also have a copy of the permit and approved plan available at the project site at all times until the project is complete.
8. Your acceptance of this permit and efforts to begin work on this project signify that you have read, understood and agreed to follow all conditions of this permit.
9. You must submit a series of photographs to the Department, within one week of completion of work on the site. The photographs must be taken from different vantage points and depict all work authorized by this permit.
10. The plan as proposed must be completed, including revegetation, by September 15, 2002. If the applicants are unable to complete this project by September 15, 2002, they must inform Mr. Hanaway and present an alternative plan to undertake the grading by November 30, 2002. Temporary erosion control measures including but not limited to placement of geo-fabrics must be a part of the revised plan.
11. Construction shall be accomplished in such a manner as to minimize erosion and siltation into surface waters. Erosion control measures such as silt fence and straw bales must meet or exceed the standards in the Wisconsin Construction Site Best Management Practices Handbook. Erosion control measures must be in place at the end of each working day. These measures must be inspected, and any necessary repairs or maintenance performed, after every rainfall exceeding ½ inch and at least once per week. You must maintain a log of the erosion control inspections, repairs made, and rain events. This must be made available to Department personnel upon request and must remain on the project site at all times work is being performed.
12. The removal of vegetative cover and exposure of bare ground must be restricted to the minimum amount necessary for construction. Areas where soil is exposed must be protected

from erosion by seeding and mulching, sodding, diversion of surface runoff, installation of straw bales or silt screens, placement of erosion control fabric, construction of settling basins, or similar methods as soon as possible after removal of the original ground cover as described in the Wisconsin Construction Site Handbook (BMP's).

13. You must not deposit or store any of the graded or excavated materials in any wetland or below the ordinary high water mark of any waterway. All graded materials must be placed out of the floodway of any stream. Removal of the bank shall be such that the bank materials are to be scraped landward and not lakeward. The bluff and bank materials shall not go onto the lakebed.
14. The storm water inlets shall be cleaned and maintained on a regular basis.
15. The graded slopes shall be compacted before placing the topsoil and erosion mats.
16. The applicant shall provide to the Department engineer the surveyed contours after the design grade is achieved.

Dated at Madison, Wisconsin on August 16, 2002.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
Telephone: (608) 266-7709
FAX: (608) 264-9885

By _____
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48, and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.